The Central Law Journal.

SAINT LOUIS, MARCH 14, 1879.

CURRENT TOPICS.

In the United States Circuit Court for the Eastern District of Pennsylvania, in the case of *Arthur v. New England Mutual Ins. Co.* 6 W. N. 403, it was lately ruled that on a proceeding for the removal of a cause from a State to the Federal court, although it is optional with the party petitioning, whether he file the copy of the record on or before the first day of the then next session of the circuit court, the other party may, if he pleases, file the copy himself, and in so doing is considered to have acted for the party petitioning; and this may be done at any time after the filing of the petition and bond in the State court. McKennan, J., said: "It never could have been intended by the national legislature to destroy the parties' rights by an act which professedly extended their right of litigation in this court; and the illustration used in argument, ['If, on a motion in the State court for a preliminary injunction, or for a receiver, the defendant can delay the cause six months by filing his petition and bond, and then pocketing the record, the act of Congress becomes destructive of the most important rights'], shows how completely the complainant in any suit in equity would be at the mercy of his opponent, if such were to be its construction. We recently decided in Taylor v. Rockefeller, 7 Cent. L. J. 349, that the State court ceased to have jurisdiction upon the proper filing of the petition and bond, in cases where the act of Congress gave jurisdiction in the cause to this court. The result is that the cause from that time is, in theory, in this court, and the only question is whether, where the party who has the right neglects to file the copy, to the detriment of the other party, the latter can not do it for him. I have no doubt that he can."

In *Lax v. Corporation of Darlington*, the Queen's Bench division of the English High Court of Justice, recently decided a question as to negligence which had been reserved at the trial. The defendants were owners of a public market, to which the plaintiff brought cattle for sale, and paid toll for so doing. The defendants erected a spiked railing round a statue in the market, which the jury found was of insufficient height and dangerous to cattle. A cow of the plaintiff was killed in attempting to leap the railing. It was not contended that the plaintiff had been guilty of any negligence in not properly looking after his herd, but the defendants contended that they were under no obligation to have the fence of such a height as that cattle could not or would not be tempted to leap it; that plaintiff was a licensee who must take the market as he found it; that there was plenty of room for him to stand his cattle elsewhere (which seems to have been so), and that, as the danger was not concealed, but one obvious and apparent, he placed the cattle there at his peril. The court overruled these objections and found for the plaintiff. "I am of opinion," said Lush, J., "that neither of these objections is tenable. The franchise of a market, like that of a port, is granted for the benefit of the public, and any one has as good a right to frequent the market for selling and buying the marketable commodities as he has to traverse a public highway. The grantee of a market, especially when he takes a toll for his own benefit, does, I think, incur an obligation to maintain the market in a state reasonably fit for the purpose for which it was granted; see the observations of Mr. Justice Bayley in Prince v. Lewis, 5 B. & C. 371. I see no reason why, if he erects in the place which he appropriates to the market, any obstruction which causes damage to the property or the persons of those who frequent the market for a lawful purpose, he should not be liable to an indictment as much as the person who places a dangerous obstruction in a public highway. Of course, where the danger is, as it was in this case, obvious and apparent, a person who heedlessly and without reasonable care to avoid it, incurs damage, cannot maintain any action, because he is the author of his own wrong. But he is not a contributor to his own wrong by going to the market. * * * I was impressed at the time with an argument urged by Mr. Herschell. Suppose, he said, that the market was situated on the bank of a river or lake, is the man responsible

if cattle brought there run into the water and drown themselves? If the specific spot were designated in the charter by which the m rket was granted, so that the grantee had no option to hold it elsewhere, I am inclined to think he would, even in that case, be bound to fence for the protection of cattle; but, if no place were designated, and he voluntarily selected so dangerous a spot, I should say certainly he would. This case, however, does not require that question to be answered. The charge against the corporation is of misfeasance, not of nonfeasance. The erection which constituted the danger in this case was an artificial erection by them, by which they rendered a safe market an unsafe one. That was a wrongful act. * * * The defendants had done a wrongful act in placing the spiked rails in the cattle market so low as to be dangerous to the cattle. This was the immediate cause of the injury, and they cannot say the plaintiff was guilty of negligence in using that part of the market which they assigned to him, though it was in proximity to the danger, he not being guilty of any negligence which immediately conduced to the accident."

THE SEVENTH VOLUME OF THE "AMERICAN DECISIONS."*

The seventh volume will disappoint none of the patrons of this series to whom the previous volumes had given an assurance that they were investing their money to good advantage. It is as good as any of its predecessors, perhaps somewhat better than one or two of them; for the annotations are fuller, and the decisions treated in this way more numerous than ever. The cases in this volume are excellently selected. They are from nine States—Massachusetts, Connecticut, New York, New Jersey, Maryland, Pennsylvania, Virginia, North Carolina and Kentucky, and from seventeen different volumes of reports, viz.: 12, 13 & 14 Mass.; 1 & 2 Conn.; 12, 13 & 14 Johns., 1 & 2 Johns. Ch.; 1 Southard; 1 & 2 Sergeant & Rawle; 4 Harris & Johnson; 5 Munford; 1 N. C. Term, and 4 Bibb. The cases cover a period of three years, from 1815 to 1817. As this is the first volume of the series issued in 1879, we may suppose that the promise of ten volumes a year will hardly be carried out. But a work of this kind should not be hurried, and it is much better that the undertaking should be well done than that it should be quickly done. There are in this volume very full and valuable notes, from two to nine pages in length, on the following subjects: Usurable interest; easements of light and air; lateral support; successive attachments; sales by sample; contracts of infants; slander; foreign divorces; disseisin; computation of time; the statute of frauds; pledges; the consideration of marriage; the liability of innkeepers' specific performance; riparian rights; chancery relief against mistake, and contracts in restraint of trade. A number of other cases are also annotated, but at less length. Among the decisions of interest, we note the following:

In *Adams v. Freeman*, 12 Johns., 428, the Supreme Court of New York demonstrated the fact that the house of an American is as much his castle as, according to the old saying, is that of an Englishman. The defendant walked into the dwelling-house of the plaintiff, and on being requested to leave, replied that "he would go when he pleased." Repeated requests failed to move him until he had remained half an hour or so, when he left of his own accord, without having done any injury at all to the premises. The plaintiff brought trespass, which the trial court held did not lie. But the supreme court was of a different opinion, saying, *per curiam*:

"To enter a dwelling-house without license is in law a trespass. Any person professing to keep an inn, thereby gives general license to all persons to enter his house. But the house of the plaintiff does not appear to have been an inn, and therefore to render such an entry lawful, there must be a permission express or implied, and familiar intimacy may be evidence of general license for such purpose. According to the evidence, here was no such permission, and therefore the act of entering the plaintiff's house was a trespass. Besides, if the defendant had received permission to enter, as by being asked to walk in, upon his knocking at the door, his subsequent conduct was such an abuse of the license as to render him a trespasser *ab initio*.

This case, it appears, has been cited and followed in several States (*vide* Markham v. Brown, 37 Ga. 281; Markham v. Brown, 8 N.

*THE AMERICAN DECISIONS, containing all the cases of general value and authority decided in the courts of the several States from the earliest issue of State reports to the year 1869. Compiled and annotated by JOHN PROFFATT, L. L. B., Author of a Treatise on Jury Trial, etc. Vol. VII. San Francisco. A L. Bancroft & Co. 1879.

H. 631; Stephens v. Lawson, 7 Blackf. 276; Allen v. Crofoot, 5 Wend. 510; Martin v. Houghton, 45 Barb. 260), although in the last sentence cited, the court does not seem to have remembered the Six Carpenters Case.

In McMillan v. Vanderlip, 12 Johns. 165, where the plaintiff agreed to work for the defendant for a certain time and to spin yarn at a certain price, and afterwards left his service, and brought an action for spinning a certain quantity, it was held that the contract was entire, and must be performed as a condition precedent before any action could be maintained for the price of the labor. Until payment is demanded, the liability of one who has received money to the use of another is not a "debt" within the meaning of an act discharging insolvent debtors from all "debts." *Pease v. Folger*, 14 Mass 264. In *Merritt v. Clason*, 12 Johns. 102, the memorandum of a contract under the statute of frauds was objected to because signed in lead pencil, but the court held it valid. Platt, J., for the supreme court, said: "I have no doubt that the memorandum required by the statute may as well be written with a lead pencil as with a pen and ink; and it is observable that in most of the reported cases on this head, the memoranda were written with a lead pencil and no counsel until now has ever raised that objection." But this did not satisfy the defendant who took the case to the court of errors, where Chancellor Kent was enabled to pass on the question. He affirmed the judgment of the supreme court in this language (18 Johns. 484):

"The statute of frauds in respect to such contracts as the one before us, did not require any formal and solemn instrument. It only required a note or memorandum, which imports an informal writing done on the spot, in the moment and hurry and tumult of commercial business. A lead pencil is generally the most accessible and convenient instrument of writing on such occasions, and I see no good reason why we should wish to put an interdict on all memoranda written with a pencil. I am persuaded it would be attended with much inconvenience and afford more opportunities and temptations to parties to break faith with each other, than by allowing writing with a pencil to stand. It is no doubt very much in use. The courts have frequently seen such papers before them, and have always assumed them to be valid. This is a sanction not to be disregarded."

Com. v. Bowen, 13 Mass. 356, presents a curious phase of the criminal law. From this case it appears that to advise a person to commit suicide may amount to murder, if the advice is followed. There, the party to whom this advice was given was a felon and already under sentence of death, but that did not make any difference. Parker, C. J., in charging the jury, said:

'The goverment is not bound to believe that Jewett would not have hung himself, had Bowen's counsel never reached his ear. The very act of advising to the commission of a crime is of itself unlawful. The presumption of law is that advice has the influence and effect intended by the adviser unless it is shown to have been otherwise; as that the counsel was received with scoff or was manifestly rejected and ridiculed at the time it was given. It was said in the argument that Jewett's abandoned and depraved character furnishes ground to believe that he would have committed the crime without such advice from Bowen. Without doubt he was a hardened and depraved wretch. But it is in man's nature to revolt at the idea of self-destruction. Where a person is predetermined upon the commission of this crime, the seasonable admonition of a discreet and respected friend would probably tend to overthrow his determination. On the other hand, the counsel of an unprincipled wretch, stating the heroism and courage the self-murderer displays, might induce, encourage and fix the intention and ultimately procure the perpetration of the dreadful deed. And if other men would be influenced by such advice the presumption is that Jewett was so influenced. He might have been influenced by many powerful motives to destroy himself, still the inducements might have been insufficient to procure the actual commission of the act, and one word of additional advice might have turned the scale.

"It may be thought singular and unjust that the life of a man should be forfeited merely because he has been instrumental in procuring the murder of a culprit within a few hours of death by the sentence of the law. But the community has an interest in the public execution of criminals; and to take such an one out of the reach of the law is no trivial offense. Further, there is no period of human life which is not precious as a season of repentance. The culprit, though under sentence of death, is cheered by hope to the last moment of his existence. And you are not to consider the atrocity of this offense in the least degree diminished by the consideration that justice was thirsting for its sacrifice, and that but a small portion of Jewett's earthly existence could in any event remain to him."

This case was relied on by the Supreme Judicial Court of Massachusetts in a very recent decision, Com. v. Mink, 6 Cent. L. J. 488, where the same responsibility was held to apply to the accidental killing of another by one attempting to commit suicide. In *Com. v. Sharpless*, 2 S. & R. 91, it was rule dthat on indictments for publishing or exhibiting obscene pictures, the offensive publication need not be exhibited in the record. "I am for paying some respect to the chastity of our records," says Tilghman, C. J. The English rule is otherwise, as was decided in a late and somewhat notorious case (Reg v. Bradlaugh, 6 Cent. L. J. 202), in which the American cases were referred to.

There are several cases on the law of com-

mon carriers. The "act of God" is held to embrace the striking of a vessel on a rock not known to the master. "For though the rock had been there for ages, yet if it had never been discovered before, it is the same thing as if it had been created and placed there immediately before the accident happened." *Williams v. Grant*, 1 Conn. 487. In *Roberts v. Turner*, 12 Johns. 232, a person receiving goods for transportation but having no interest or control in the vessel by which they are forwarded, is held not to be liable as a common carrier. The unskillfulness of a pilot is not a "peril of the sea." *Harvy v. Pike*, N. C. Term. Rep. 82. In *Barney v. Prentiss*, 4 H. & J. 317, the question whether or not a carrier could limit his common law liability by a general notice, coming for the first time before the Court of Appeals of Maryland, that court refused to decide it, but held that the notice in question was void on account of its ambiguity. As usual, we are not without a slander case in this volume. In the Commonwealth of Massachusetts one Briggs remarked of a neighbor, "Old Chaddock stayed at our house last night and was pretty devilish drunk; he was so drunk he could not find his key," and straightway found a verdict against him for slander. It was affirmed by the supreme court, which held that, because the plaintiff was a clergyman, no proof of special damage was required. *Chaddock v. Briggs*, 13 Mass. 248.

A single woman, dependent on her brother, has an insurable interest in his life. *Lord v. Dall*, 12 Mass. 115. A vessel is to be deemed "at sea," within the terms of a policy of insurance, while in a foreign port, having been captured and carried there against the will of the master. *Wood v. New England Ins. Co.* 14 Mass. 31. In *Bradford v. Manly*, 13 Mass. 138, it is held that a sale by sample amounts to a warranty that the article sold is of the same kind as the sample. This case, according to Mr. Parsons (vol. 1, p. 585), is a "leading case in America" upon this subject, and lays down the law as it is at this day. In *Walker v. Swartwout*, 12 Johns. 444, it is decided that a public agent, in his known official capacity, employing one to labor on public work, can not be held personally liable for his wages. *Connecticut v. Jackson*, 1 Johns. Ch. 13, contains an exhaustive discussion by Chancellor Kent as to the allowance of compound interest. In *Vanuxem v. Hazlehurst*, 1 South. 192, bankrupt and insolvent laws are thus distinguished: "Insolvent laws are optional; bankrupt laws are compulsory; insolvent laws operate equally upon all men and have for their object only the liberation of the debtor; bankrupt laws respect only merchants and traders and exonerate them from their debts."

Potts v. Imlay, 1 South. 330, was an action for the malicious prosecution of a civil suit, which the Supreme Court of New Jersey held would not lie unless the defendant had, upon such prosecution, been arrested without cause and deprived of his liberty. After stating that "the books have been searched for four hundred years back, and upon that search it is conceded, even by the counsel for the plaintiff below himself, that no case can be found in which this action has been maintained in circumstances similar to the present," Kirkpatrick, C. J., says:

"If we go to the very equity of the thing, which seems to be the ground of argument here taken, the same reasoning which is here used to prove that the defendant ought to have damages upon a false claim, would also prove that the plaintiff ought to have damages upon a false plea. He is put to all the expense of a trial upon such plea, and yet he can recover nothing therefor but his lawful costs, though surely all experience teaches us that the plea of the defendant is not less frequently false than the claim of the plaintiff. But to what excesses would this lead us? Where would litigation end? The truth is, that merely for the expenses of a civil suit, however malicious and however groundless, this action does not lie, nor ever did, so far as I can find, at any period of our juridical history. It must be attended, besides necessary expenses, with other special grievance and damage, not necessarily incident to a defense, but superadded to it by the malice or contrivance of the plaintiff, and of these an arrest seems to be the only one spoken of in our books."

We would suggest that this is one of the few cases in this volume which the editor has not annotated, but which, at the same time, deserves that prominence. The principle of this case must, we think, since the decision of the Court of Appeals of Kentucky in Woods v. Finnell, 7 Cent. L. J. 18, be considered as one not at all settled in this country.

AMONG the "Flotsam and Jetsam" of the *Canada Law Journal* we find the following: "A county judge in England, who had received his appointment more on account of his political creed than his ability, was surprised to find that an assistant judge had been appointed to his court. A friend asked Lord Westbury the reason for his creating another judge. The Chancellor replied: 'We are afraid of leaving Mr. A. any longer *alone in the dark*.'"

PRINCIPAL AND AGENT — UNDISCLOSED EMPLOYMENT BY TWO PARTIES — DOUBLE COMPENSATION.

SCRIBNER v. COLLAR.

Supreme Court of Michigan, January Term, 1879.

1. AN UNDISCLOSED ARRANGEMENT to act for each side in negotiating the sale or exchange of property is contrary to public policy, and affords no ground of action to recover pay for the service, even though there is no actual fraud or duplicity.

2. BY A WRITTEN AGREEMENT, A PARTY placed property for sale or exchange, at his option, in plaintiffs' hands, agreeing to pay a commission, and to render all assistance in his power in making such sale or exchange: *Held*, that this did not render plaintiffs mere middlemen to bring the parties together, but authorized them to negotiate and contemplated that they should use their judgment and influence in their employer's behalf; and that an undisclosed retainer by the party with whom an exchange was finally consummated, prevented recovery of commission.

GRAVES, J., delivered the opinion of the court:

The plaintiffs recovered judgment against defendant for certain commissions, and a review of the proceedings is asked upon a case made.

The defendant owned certain real estate he wished to sell or exchange, and he employed the plaintiffs to aid him. The arrangement was in writing, and signed by defendant in a book kept by plaintiffs for such entries. After designating the property and the price, and setting down the amount to stand on mortgage, and the time of credit and rate of interest, it proceeded as follows: "I hereby place the above-described property in the hands of Messrs. Scribner & Potter, for sale or exchange for farm property at my option, and agree to pay them a brokerage commission of 2½ per cent. when sale or exchange is made, and further agree to render all the assistance I can in making such sale or exchange." At the same time this arrangement was made, the plaintiffs were under a similar retainer from persons by the name of Warren, who had a farm they wished to sell or exchange. Of this fact the defendant was ignorant.

In the course of a few weeks, the plaintiffs facilitated the opening of negotiations between the Warrens and defendant, and the parties not long after, through the aid of plaintiffs, consummated a trade, the Warren property being granted to Homer A. Collar, a son of defendant. There were some special circumstances connected with the substitution of the former for the latter as grantee, which are somewhat obscure to say the least, but the result is not governed by them. After this trade, it was ascertained by the defendant that during this negotiation, the plaintiffs were acting under retainers from the Warrens, and for an agreed compensation, and he objected in the court below, and objects here that this fact is a complete answer to the action.

The plaintiffs' counsel have not contested and do not contest the principle that the same person can not be the agent of both parties, in reference to a matter where discretion is to be exercised upon interests which are conflicting. He contends that the plaintiffs were not in that situation, but, on the contrary, that the retainers taken by the plaintiffs required them to do no more than bring the parties together, and that in this the interests of defendant and the Warrens were concurrent, and not conflicting; that these persons were left to negotiate as they pleased, and uninfluenced by the plaintiffs; that no opportunity existed for any infringement of good faith, and that it was just and lawful to take employment and pay from both sides. There is nothing in the record to impugn the personal fairness and integrity of purpose of the plaintiffs in this transaction, and the only question is whether the undisclosed arrangement to act for each side so accords with public policy as to afford a ground of action to recover pay for the service.

There is some contrariety of decision in regard to the right to accept a double retainer and double pay, even when the fact is disclosed to both parties. Farnsworth v. Hemmer, 1 Allen, 494; Walker v. Osgood, 98 Mass. 348; Pugsley v. Murray, 4 E. D. Smith, 245; Everhart v. Searle, 71 Penn. St. 256; Raisin v. Clark, 41 Md. 158; Schwartze v. Yearly, 31 Md. 270; Morrison v. Thompson, L. R. 9 Q. B. 480, 10 Eng. 129; Rice v. Wood, 113 Mass. 133; Lynch v. Fallon, 11 R. I. 311, 3 Cent. L. J. 316. But the cases are nearly, if not quite, uniform, that where the double employment exists and is not known, no recovery can be had against the party kept in ignorance, and the result is not made to turn upon the presence or absence of designed duplicity and fraud, but is a consequence of established policy.

The opinion has been expressed that where the person is employed merely as a middleman, to bring persons together, and has no duty in negotiation, and has not engaged his skill, his knowledge or his influence, he may lawfully claim pay from both parties. Rupp v. Sampson, 16 Gray, 98; Siegel v. Gould, 7 Lansing, 177. No doubt such cases may occur. But this exceptional character should appear clearly before they should be exempted from the general principle. In Walker v. Osgood, *supra*, the court explained Rupp v. Sampson, and pointed out the distinction on which it proceeded. The plaintiff was employed merely to perform a preliminary act. His sole office was to bring two specified persons together.

The plaintiffs' counsel in this case has mistaken, as I think, the construction due to the writing on which the case is based. The employment was not merely that defendant and some third party should be brought together for mutual negotiation, with an option on defendant's part to do anything or nothing. The writing placed the property for sale or exchange in plaintiffs' hands, and then reserved an option as to whether the final disposition should be a sale or an exchange, and expressly required defendant to offer the *plaintiffs* all the *assistance* he could in making such sale or exchange. The contract had large scope, and went much further than to constitute the plaintiffs mere middlemen to bring some particular third persons, or even any one in general, into a position to negotiate with the defendant. It conferred authority to negotiate

and reposed trust and confidence, and contemplated that the plaintiffs should act in defendant's interest, and should exert their judgment and their influence in his behalf. Such was the contract entered into, and there is no other to support a recovery. And the view most favorable to the plaintiffs is that the evidence of this claim did not depart from it.

The proof of a claim not consonant to the writing would of course be of no avail. No other relation than that caused by this agreement is involved in the groundwork of the alleged cause of action, and no showing of a different relation can be urged by plaintiffs to sustain their case. Whether they interfered more or less or not at all with the negotiations, could not change the relation caused by the contract, or increase or diminish their duty under it. If their judgment and influence were due to defendant; if they owed him the full measure of their skill and favor to assist him to reach a result most advantageous to him, it might well be that an omission to interfere and take an active part would be a failure of duty, and this failure, moreover, might be a consequence of the adverse retainer.

The parties employed might not be conscious of any bias, and still be induced to maintain an inactive or neutral position, instead of the helping and positive position bargained for. There might be this or that degree or extent of dereliction, as a consequence of the employment by the other side, and yet no actual moral lapse be involved.

It seems to me there is no escape here from the rule of policy before mentioned, and that the judge ought not to have submitted, as he did, upon the theory of plaintiffs' counsel. In view of the special circumstances disclosed by the record, a contrary result, were it admissible, would not be distasteful.

The judgment must be reversed with costs, and a new trial ordered.

WAGERS —EQUITY JURISDICTION TO ENJOIN STAKEHOLDER.

PETTILON v. HIPPLE,

Supreme Court of Illinois.

[Filed at Ottawa, Jan. 25, 1879.]

A court of chancery, under its general power, has jurisdiction to restrain the enforcement of a gaming contract, and enjoin the stakeholder from paying over the money deposited in his hands. But the bill asking for such relief must show affirmatively that the money has not yet been paid over by the stakeholder.

WALKER, J., delivered the opinion of the court:

It appears that appellant, in the month of October, 1876, made a bet of fifty dollars on the result of the Presidential election, which occurred on the 7th day of the following November, with one Campbell; that subsequently, in the same month, he made a similar bet of one hundred dollars on the result of the same election, with the same person; that complainant and Campbell each placed in the hands of appellee one hundred and fifty dollars as a stake; that soon after the election complainant became dissatisfied with the manner in which it had been conducted, and called on Campbell for the purpose of withdrawing the stakes thus deposited, and withdrawing and rescinding the bets, and had repeatedly so requested of Campbell, but he had refused.

It is alleged that complainant had demanded of appellee the return of one hundred and fifty dollars thus deposited by complainant, but appellee refused to return the money to him; that complainant fears and believes the stakeholder will pay the hundred and fifty dollars deposited with him as aforesaid to Campbell, unless he be restrained by order of the court; that complainant "greatly fears and believes that a suit and judgment at law against said Jesse Hipple, for the money deposited as aforesaid, would be wholly worthless, and said money wholly lost to your orator by such a course, and so charges the truth to be."

The bill prayed an injunction inhibiting Hipple from paying the money deposited by complainant to Campbell or any other person, but that he be compelled to pay it to complainant, and for other and further relief. A temporary injunction was granted and perfected.

At the return term defendant, Hipple, appeared and demurred to the bill. On a hearing on the demurrer the court held the bill insufficient, and dismissed it for want of equity. Thereupon, complainant prayed and perfected an appeal to this court.

It is urged by appellant that this case is governed by the 131st section of the criminal code. It provides that all contracts of every description, made or entered into, where the whole or a part of the consideration shall be for any money, property, or other valuable thing bet on the games specified, or any election, or unknown or contingent event whatever, shall be void and of no effect. It is contended that this is a contract, the consideration of which was a bet on the presidential election, and is void. Of this there would seem to be no doubt. But the question arises whether the mere fact that the agreement to bet, and that the winner should have the whole stake, is void under the statute, confers jurisdiction on account of equity to enjoin the stakeholder from paying it to the winner, and decree him to pay the portion put up by complainant to him. That section makes no provision as to the manner in which the contract shall be avoided.

The next section provides that chancery may take jurisdiction when the loser sues to recover back the money as property lost and paid to the winner. But it will be observed that this section only relates to money, property, etc., lost and paid on gaming, and not to prevent unexecuted contracts from being enforced. That section has no application to gaming contracts not fully performed and executed. Nor does the preceding section, in terms, confer jurisdiction on a court of chancery. If that court can take cognizance of a case like the present, it is because of its genera

jurisdiction, or because that section impliedly confers jurisdiction.

In Rawden v. Shadwell, Amb. 269, Lord Hardwicke held under the statute of 9 Anne, making all securities for money at play void, that chancery would take jurisdiction and afford relief. In that case Shadwell had won £500 of complainant at backgammon for which he some time afterwards gave his bond and subsequently paid a part of the money. The report of the case states that the chancellor "decreed with great clearness and said by statute 9 Anne all securities for money won at play are made void, consequently the payment under any such security cannot be supported."

A comparison of section 131 of our criminal code will show it to be almost a literal copy of that part of the 9th of Anne, under which that decree was rendered; hence it is seen that the court took jurisdiction from its general powers or under the 3d section of that act, which requires all persons to answer and discover under bills that should be preferred under the act. In the British act it is provided that chancery may take jurisdiction for discovering. In theirs it is in a different section. So it is in ours. The 131st and 132nd sections of our criminal code were previous to the revision of 1874 in the chapter entitled, "Gaming" and both formed a part of that act.

In the case of Downs v. Quarles, Littell's Select Cases, 489, it was held that a court of equity would not under the statute of Kentucky sustain a bill for the recovery of money paid on a gaming contract on the mere ground that it was so lost. But it was said that anterior to any legislation on the subject of gaming which was not prohibited by the common law: "Chancery watched gaming contracts with a jealous eye and would frequently lay hold of slight circumstances to set them aside, such as the enormity of the demand, from which imposition would be presumed, or the fact that the sum won or lost was beyond the estate and degree of the parties, would frequently induce the chancellor to interfere * * *. Since the passage of the statutes of Virginia and this country upon the subject, all such contracts are treated as they ought to be, and are placed upon the grade of base contracts, infected with a turpitude of consideration and are declared void. Hence equity has frequently set them aside when they were executory only, and has perpetually enjoined judgments founded upon securities given on such consideration." Numerous authorities are cited in support of the proposition which fully sustain it.

It would therefore seem to follow that chancery will assume jurisdiction to prevent the enforcement of unexecuted contracts of this character. Nor does the fact that both parties are guilty of a breach of a penal statute matter. See Davidson v. Givens, 2 Bibb, 200, where this question is discussed and the court holds that on principle independent of precedent the court should exercise jurisdiction, but refers to adjudged cases which sustain the jurisdiction. We are therefore of the opinion that the court of chancery has jurisdiction to restrain the enforcement of gaming contract.

It is however claimed that the allegations of the bill are insufficient to warrant the relief and that the demurrer for that reason was properly sustained. It is insisted that the bill fails to show that appellee had not paid the money to Campbell, when the suit was brought. The bill alleges that the money was deposited with appellee by appellant and that the latter demanded it of him and he refused to restore it, and it prays an injunction to restrain him from paying it to Campbell. It also alleges that appellant fears that appellee will pay the money to Campbell. The allegations are too loose and indefinite to authorize a decree in favor of complainant. Suppose the evidence should show that the bet was made, the deposit placed in appellee's hands, a demand made and a refusal to restore it but no more; would it justify a decree to restore it to appellant? In the supposed case there would be nothing to show that the money had not been paid to Campbell before the demand was made, or even that the money had not been restored to appellant before or after the demand was made. If he, before any demand or notice, paid the money according to the terms of the bet to Campbell, he surely should not be held liable to appellant. The bill should have stated that the money was still in the hands of appellee. The nearest approach to such an allegation is that complainant fears unless he should be restrained by order of the court, he would pay it to Campbell. The rules of pleading, as all know, require that the grounds for relief shall be clearly and directly alleged and positively stated. This falls far short of the requirements of the rules. We are clearly of the opinion that the bill is fatally defective. The rules of practice only require that the allegations and proofs shall agree, and if the allegations of the bill were all proved precisely as made, the evidence would not require that the relief should be granted if a trial were had on the bill.

The party is not required to prove more than is alleged, nor could relief be granted if more were proved without amending the bill to conform to the proofs. The decree of the court dismissing the bill must be affirmed.

DICKEY, J., I concur in the conclusion in this case, but not in the grounds assigned for the same.

CRIMINAL LAW—MURDER COMMITTED IN THE PERPETRATION OR ATTEMPT TO PERPETRATE A FELONY.

STATE v. SHOCK.

Supreme Court of Missouri, October Term, 1878.

1. THE WORDS "OTHER FELONY," used in the section of the statute specifying the kinds of murder which constitute that crime in the first degree (1 Wag. Stat., p. 445, sec. 1), refer to some collateral felony, and not to those acts of personal violence to the deceased which are necessary and constituent elements of the homicide itself, and are, therefore, merged in it, and which do not, when consummated, constitute an of-

fense distinct from homicide. The doctrine of the cases of State v. Jennings, 18 Mo. 435, and State v. Nueslein, 25 Mo. 111, in so far as it conflicts with the opinion in this case, is overruled.

2. AS THE FIRST SECTION OF THE STATUTE includes only such murders as were murders at common law, can the words "other felony" be held to include offenses which were not felonies at common law: *Quere?*

3. THE DOCTRINE OF THE CASE of State v. Green, 66 Mo. 631, which is to the effect that an indictment charging a defendant with a willful, deliberate and premeditated murder, is supported by proof of a murder committed in the perpetration or attempt to perpetrate a collateral felony, commented on and approved.

4. A JUROR WILL NOT BE ALLOWED to impeach his verdict, on the ground that he would not have found the defendant guilty if he had known that the punishment fixed by law for the crime charged was death. The nature of the punishment has nothing to do with the guilt or innocence of the defendant.

Edwin Silver, *A. Finlay* and *W. Lewis*, for appellant. Attorney General *Smith* and *L. McKinney*, for the State.

HOUGH, J., delivered the opinion of the court:

At the May term, 1878, of the Circuit Court of Callaway county, the defendant was indicted for murder in the first degree for the killing of one Robt. Scott. At the November term following, he was tried and found guilty and sentenced to be hanged. Stay of execution was awarded, and the case has been heard here on appeal. The evidence on the part of the State tended to show that on the 6th day of March, 1878, the defendant beat the deceased, who was a boy between five and six years of age, with a piece of sycamore fishing-pole, about three feet long and one and a half inches in diameter, for some minutes, accompanying his beating with oaths; that he left the room in which he was beating the boy, went into the yard, procured a piece of grapevine about one and one-fourth inches in diameter, returned to the house and resumed the beating, which lasted in all about fifteen minutes. During the beating the child did not scream or cry, but groaned and moaned, and, after several days, died of the injuries so received at the hands of the defendant. An inquest was held, at which the body was examined. The child's head was found to be covered with bruises, its back beaten to a jelly and its skull fractured. On the part of the defendant, evidence was introduced tending to show that the deceased was very weakly and sickly; that the defendant did not beat it on the day named, and that the wounds on its head were caused by its falling down stairs. The deceased was a son of a cousin of the wife of the defendant, and it appears that it had been at the house of the defendant for about two months, but whether as a visitor or otherwise, the record does not show.

In support of the motion for a new trial an affidavit of one of the jurors was filed, which stated in substance, that while the jury were considering their verdict, he was of the opinion that the case was not one in which capital punishment should be inflicted, but he was induced to believe that the court had the power to inflict a less degree of punishment; that he and others of said jury were opposed to rendering a verdict in said case that would result in the death of the defendant. It will be sufficient to say on this point that a juror will not be allowed to impeach his verdict on the ground that he would not have found the defendant guilty if he had known that the punishment fixed by law for the crime charged was death. The nature of the punishment had nothing to do with the guilt or innocence of the defendant.

The only question of importance presented for our determination, arises upon the action of the court in giving, at the instance of the prosecuting attorney, the following instructions:

"4. To constitute murder in the first degree, it is not necessary that the fatal beating, wounding or striking be given with the specific intent to kill; it is sufficient if it be given willfully and maliciously, and with the intent to inflict great bodily harm, and death ensued."

"13. If the jury believe from the evidence, that it was not the intention of the defendant to kill the child, Scott, by whipping him, but that he did intend to do him great bodily harm, and in so whipping him, death ensued, he is guilty of murder in the first degree."

It is contended on behalf of the State that the foregoing instructions were fully warranted by the decisions of this court in the case of State v. Jennings 18 Mo. 435, and in State v. Green, 66 Mo. 631. In the case first named, which was a most atrocious case of lynching, the infliction of which was continued for several hours, under circumstances of the greatest cruelty and brutality, there was no occasion for any effort on the part of the State to make a case of constructive murder in the first degree, as the facts of the case justified the jury in finding the defendant guilty of a willful, deliberate and premeditated killing. The following instruction was, however, given in that case: "6. If the jury believe from the evidence that it was not the intention of those concerned in lynching Willard, to kill him, but that they did intend to do him great bodily harm, and that in so doing death ensued, such killing is murder in the first degree by the statutes of this State." Ryland, J., who delivered the opinion of this court, approved this instruction in the following language: "The sixth instruction is correct under the statute of this State (see Crimes and Punishments, R. C., 1845 § 1-38). Homicide, committed in the attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed murder in the first degree. The 38th section makes the person, by whose act or procurement, great bodily harm has been received by another, guilty of what is by our law called a felony; that is, guilty of such an offence as may be punished by imprisonment in the penitentiary."

There are two errors in the foregoing extract, which will be made patent by reciting the two sections of the statute referred to.

Section 1 is as follows: "Every *murder* which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate

and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed murder in the first degree." Section 38, now section 33, is as follows: "If any person shall be maimed, wounded or disfigured, or receive great bodily harm, or his life be endangered by the act, procurement or culpable negligence of another, in cases and under circumstances which would constitute murder or manslaughter, if death had ensued, the person by whose act, procurement or negligence, such injury or danger of life shall be occasioned, shall in cases not otherwise provided for, be punished by imprisonment in the penitentiary," etc. It will be observed that the statute does not say that every *homicide* committed in the manner therein pointed out, shall be murder in the first degree, but that every *murder* so committed shall be murder in the first degree.

The object of the first and second sections of the statute is to divide the crime of murder into two degrees, and they deal with that crime as it existed at common law. This is made manifest by the language of the second section, which is as follows: "*All other kinds of murder at common law* not herein declared to be manslaughter, or justifiable or excusable homicide, shall be deemed murder in the second degree." So that in every case under the first section the first, though not the sole inquiry to be made is, whether the homicide was murder at common law; if not, it can not be murder in the first degree under the statute. Wharton on Homicide, § 184. At common law, a homicide committed in the willful and malicious infliction of great bodily harm was murder, though death was not intended; but this was not so, because such infliction of great bodily harm was in itself a felony, in the perpetration of which the homicide was committed, but because such infliction of great bodily harm was an act *malum in se*, and the party was therefore held answerable for all the harm that ensued. Foster, 259. But as such a homicide, death not being intended, is not a willful, deliberate and premeditated killing, and is not a murder committed in the perpetration or attempt to perpetrate any of the felonies specially designated in the first section, but a simple, unintentional killing only, it has been universally classed as murder in the second degree, in those States having statutes identical with our own, with the exception of the words "other felony." Wharton on Homicide, §§ 40, 190. But as murder in the second degree with us comprehends only such homicides as are intentional, but without deliberation, it can not be so classed in this State. State v. Wieners, 66 Mo. 11, 6 Cent. L. J. 70. How it shall be classed under our statute must depend upon the construction to be given to the words "other felony," in the first section. This brings us to the second error in the statement of Judge Ryland. This error, which is the most important one, as far as the present case is concerned, consists in the declaration that the thirty-eighth (33) section makes the person by whose act or procurement *great bodily harm* has been received by another, guilty of felony. This is a very grave error. As before stated, the bare infliction of great bodily harm was not a felony at common law, and it is not made so by statute. The statute says, if any person shall receive great bodily harm by the act, procurement, or culpable negligence of another, "*in cases and under circumstances which would constitute murder or manslaughter, if death had ensued*, the person by whose act, procurement or negligence, such injury * * shall be occasioned, shall * * * be punished by imprisonment in the penitentiary," etc.—that is, shall be guilty of a felony, and punished as therein prescribed, *if death does not ensue*.

Now, upon the supposition that this felony is one contemplated by the words "other felony" in the first section, let us add this qualification to the thirteenth instruction given in this case, and see what its legal effect will be. The instruction will then read as follows: "If the jury believe from the evidence that it was not the intention of the defendant to kill the child, Robert Scott, by whipping, but that he did intend to do him great bodily harm, *under circumstances which would constitute murder or manslaughter, if death ensued* and, in so whipping him, death did ensue, then he is guilty of murder in the first degree." Would not such an instruction as this present a palpable contradiction on its face? If the circumstances under which the the bodily harm was inflicted were such as to constitute the offense manslaughter, if death ensued, by this instruction it is, nevertheless, declared to be murder in the first degree. The language adopted in the supposed instruction is, of course, not such as would be used to a jury, as it presents a question of law, but it is pertinent and proper thus to bring together the two provisions for the purpose of determining the construction of the statute. It would seem, therefore, that the offenses mentioned in the thirty-third section are not such as are meant by the words "other felony" in the first section.

We are of the opinion that the words "other felony" used in the first section refer to some collateral felony, and not to those acts of personal violence to the deceased which are necessary and constituent elements of the homicide itself, and are, therefore, merged in it, and which do not, when consummated, constitute an offence distinct from homicide. Wharton on Homicide, §§ 55, 56, 57, 58, 62.

Again, the first section declares that all murders committed in the perpetration or attempt to perpetrate, any arson, rape, robbery, burglary or other felony, shall be murder in the first degree. As this section, as before shown, includes only such murders as were murders at common law it may well be doubted whether the words "other felony" can be held to include offenses which were not felonies at common law. This point however, we do not now decide, it being unnecessary in the present case. But the statute evidently contemplates such other felony "as could be consummated, although the murder should also be committed." It says murders "committed *in the perpetration*, or attempt to perpetrate," any felony. It were absurd to say that there could be an attempt to perpetrate a felony which could not be perpetrated. The statute, therefore, must refer to such felony as may be perpetrated, although the murder is committed.

The arson, rape, robbery, burglary may each be perpetrated and the murder also be committed. But when great bodily harm has been inflicted, and death immediately or speedily ensues therefrom, what felony has been committed, either at common law or under our statutes, in addition to the murder? The infliction of great bodily harm is, by the statute, only made a felony *when death does not ensue*, and when, if it had ensued, *the whole offence, including the infliction of the bodily harm*, would constitute either murder or manslaughter. But whether murder or manslaughter would have to be determined by the circumstances of the case, as in other cases of personal violence terminating in death, when the same was not inflicted in the perpetration or attempt to perpetrate some collateral or independent substantive crime. Kelly v. Commonwealth; 1 Grant's Cases, 487.

If the instructions given in this case can be upheld, it will convert many cases of unintentional killing, which are manslaughter only under other provisions of the statute, into murder in the first degree. These views are in accordance with the construction placed by this court upon an analogous provision of the statute, relating to inferior grades of homicide. The statute defining manslaughter in the first degree is as follows:

"Section 7. The killing of a human being without a design to effect death by the act, procurement or culpable negligence of another, while such other is engaged in the perpetration or the attempt to perpetrate any crime or misdemeanor, not amounting to a felony, in cases where such killing would be murder at common law, shall be declared manslaughter in the first degree."

It was held by this court in the case of State v. Sloan, 47 Mo. 604, that the foregoing section contemplates some other misdemeanor than that which is an ingredient in the imputed offense, otherwise that part of it relating to an attempt to perpetrate a misdemeanor would be wholy nugatory; that where an act becomes criminal from the perpetration or the attempt to perpetrate some other crime, it would seem that the lesser could not be a part of the greater offense. See People v. Butler, 3 Parker's C. C. 377; People v. Sheehan, 49 Barb. 217; People v. Rector, 19 Wend. 605.

On the facts of this case, we think the jury might properly have been instructed as to the law of murder in the first degree, on the theory of a willful, deliberate and premeditated killing, and also as to the law of manslaughter in the fourth degree. It was to be expected, of course, that the circuit court would, in passing upon the instructions presented at the trial of the case, be governed by the decision of this court in the case of State v. Jennings; but the doctrine of that case, and of the case of State v. Nueslein, 25 Mo. 111, in so far as it conflicts with our opinion in this case, is overruled. There is no conflict between this case and the case of State v. Green, 66 Mo. 631. In the latter, the defendant, at the time of the homicide, was resisting an officer under circumstances which made such resistance a collateral felony, both at common law and under the statute. True, the Jennings case was cited in support of instructions numbered 3 and 4, given for the State in that case, which omitted the elements of deliberation and premeditation; but those instructions were unlike the sixth instruction in the Jennings case, and the thirteenth instruction in the case at bar, and are in conformity with this opinon. Neither of them declared that if the defendant did not intend to kill the deceased, but did intend to inflict upon him some great bodily harm, he was guilty of murder in the first degree. The person killed by Green was an officer who had a warrant for his arrest on a charge of felony; and instructions three and four, above referred to, were to the effect that if the deceased read such warrant to the defendant, or notified him of his authority to arrest him, and the defendant killed the deceased in resisting such arrest, he was guilty of murder in the first degree. Those instructions were undoubtedly correct, for the reasons heretofore given. The difference between that case and the present one is apparent. The judgment will be reversed, and the cause remanded.

NAPTON and HENRY, JJ., concur.

NORTON, J., dissenting.

As I do not concur either in the conclusion announced by the court, on in the reasoning on which it is based, and as the question involved is one of great importance, it is but proper that my reasons for dissent should be given.

The main point of controversy grows out of the action of the trial court in giving the following instruction, viz.: "If the jury believe from the evidence that it was not the intention of the defendant to kill the child, Scott, by whipping him, but that he did intend to do him great bodily harm, and in so whipping him death ensued, he is guilty of murder in the first degree."

It may be announced as a principle well established that when a statute of another State having received judicial construction, is adopted in this State, it is usual and proper to give it the same construction there placed upon it. So, when a statute has been construed by this court, and it is subsequently re-enacted by the General Assembly without alteration or change in any respect, it is to be understood as having been enacted in the sense in which it had been judicially interpreted.

The precise question presented in this case first arose in 1853, in the case of State v. Jennings, 18 Mo. 435, and involved a construction of the same sections of the statute relating to murder in the first degree, and to the crime of inflicting "great bodily harm" upon another, and it was then held that if A intended to inflict upon B great bodily harm, and that in so doing death ensued, such killing was murder in the first degree, although A did not intend to kill B. The reason assigned for the conclusion reached was, that under section thirty-eight of the Revised Statutes of 1845, it was made felony for one person to inflict great bodily harm upon another, under circumstances neither justifiable nor excusable, and that section one of the same statute, defining murder, declared that every homicide committed by another while perpetrating, or attempting to perpetrate any felony, was murder in the first degree. This con-

struction was approved by the General Assembly in the Revised Statutes of 1855, when they re-enacted the same sections in the same words, and again approved it in 1865, by re-enacting in the general statutes of 1865 the same sections without change.

The same question of construction arose in 1857, in the case of State v. Nueslein, 25 Mo. 111, and the construction given to the sections in the case of State v. Jennings, was fully approved by the undivided court. The question again arose in the case of State v. Green, in 1877, and the above cases fully sanctioned. The principle was again sanctioned in the case of State v. Swain, decided at the present term. I can not, therefore, consent to overthrow both such judicial and legislative construction of the statute relating to what is murder in the first degree, unless it be made *clearly to appear*, by adjudicated cases based upon the construction of a statute similar to our own, or by *incontrovertible* reasoning that such construction can neither be maintained on principle nor authority.

The authorities referred to for the purpose of demonstrating that such construction is erroneous fall short of establishing the proposition. The principle authority referred to is the case of People v. Rector, 19 Wend. 605. In that case, the court was called upon to say whether the trial judge committed error in refusing to instruct the jury "that if they came to the conclusion that the prisoner inflicted the mortal wound upon the deceased in an attempt to commit an offense which of itself was less than a felony, then he should not be convicted of murder." This instruction was refused by the trial judge because, as he said, it "was inapplicable to the case." In disposing of the question thus presented, it became necessary for the court to consider two sections of the New York statute relating to murder and manslaughter in the first degree. That relating to murder declares a killing to be murder "when perpetrated by an act immediately dangerous to others and evincing a depraved mind, regardless of human life, although without, *any premeditated design* to effect the death of any particular individual." That relating to manslaughter provides as does our statute "that the killing of a human being, without a design to effect death, by the act, procurement or culpable negligence of any other, while such other is engaged in the perpetration of any crime or misdemeanor not amounting to a felony, or in an attempt to commit any such crime or misdemeanor in cases where such killing would be murder at common law, shall be deemed manslaughter in the first degree." Each of the three judges composing the court delivered separate opinions on the point presented. Judge Cowen was of the opinion "that the charge should have been given because the statute defining manslaughter was intended to reduce the offense to manslaughter in the first degree in all cases where the jury shall find the assailant intended to *stop with the commission of a misdemeanor although the blow were aimed at the person.*" 19 Wend. 593. Judge Bronson held that the charge was properly refused by the trial court because "such a charge could only be proper where the accused was committing or attempting to commit some other offense than that of intentional violence upon the person killed." 19 Wend 605. Judge Nelson expressed the opinion that the charge was properly refused because it withdrew from the consideration of the jury the higher offense of murder, under which it might fall under the provision of the statute which makes killing murder, "when perpetrated by an act imminently dangerous to others and evincing a depraved mind regardless of human life although without premeditated design to effect death." He observes "that within this provision, the offense may be committed where the actual intent at the time may be to commit an offense under the degree of felony, it may be simply to commit an assault and battery and still if death ensue under the circumstances *alluded to in the statute*, the killing may be murder." He concludes by saying that "upon the whole he concurs in the conclusion, principally on the first point considered;" this point related to the admissibility of evidence. So that of the three judges only one of them expressed the opinion that the crimes or misdemeanors alluded to in the section defining manslaughter in the first degree related to some crime or misdemeanor other than that of intentional violence upon the person killed.

The case can not therefore be properly quoted as an authority to establish the proposition that the "other felony" referred to in our statute defining murder in the first degree must be a distinct felony from one committed on the person whose death is occasioned by the perpetration or attempt to perpetrate a felony. I have been thus particular in analyzing the case of People v. Rector, *supra*, because it is the basis of the opinion expressed by the court of oyer and terminer in the case of People v. Butler 3 Park. C. C. 377, and of that expressed by Judge Wagner in the case of State v. Sloan, 47 Mo. 604.

Having shown that only one of the three judges in the case of People v. Rector, assented to the principle announced in the case of People v. Butler, and State v. Sloan, it follows that the two latter cases are without support by the former, and as the opinion announced by my associates is founded mainly on the above cases it does not rest on authoritative foundation.

It may be conceded that no homicide committed in this State can under sections one and two, page 445 Wag. Stat., be murder in either the first or second degree unless such homicide was murder at common law. That the defendant in killing the child under the circumstances disclosed in the evidence would at common law have been guilty of murder can not be questioned. At common law, the intent to do "enormous" or severe bodily harm followed by homicide constitutes murder * * * So "if A. only intends to severely beat B. in anger from preconceived malice and happen to kill him, it will be no excuse that he did not intend all the mischief that followed, for what he did was *malum in se* and he must be amenable for its consequences. He beat B. with the intention of doing him great bodily harm and is therefore amenable for all the harm he did." Whart. on Homicide, s. 40, p 40. So the defendant in this case in the light

of the facts developed by the evidence would, at common law, have been guilty of murder.

Is this common law murder, under our statute murder in the first or second degree or manslaughter in the first degree? Section one, page 445 Wag. Stat. declares that "every murder * * * committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary or other felony, shall be deemed murder in the first degree." If, therefore, the defendant was engaged in the perpetration of a felony in beating the deceased, a child five years old, with a fishing pole, one and a half inches in diameter, and a grape-vine one and a fourth inches in diameter, in a most cruel manner, and the death of the child was the result, it necessarily follows that the homicide thus committed falls within the statutory definition of murder in the first degree and can be nothing less.

That defendant in thus beating the child was engaged in the perpetration of a felony is manifest from the thirty-third section page 450 Wag. Stat. which declares that "if any person shall be maimed, wounded or disfigured, or receive great bodily harm, in cases and under circumstances which would constitute murder or manslaughter if death had ensued, the person by whose act such injury or danger to life shall be occasioned, shall be punished by imprisonment not exceeding five years &c." This statute makes it a felony for any person to inflict great bodily harm upon another under circumstances neither justifiable nor excusable, and it necessarily follows that if the defendant was inflicting, and only intended to inflict great bodily harm on the child under such circumstances and then stop, he was engaged in the perpetration of a felony. If in the commission of this felony, the death of the child was occasioned, whether defendant intended it or not, then the inflexible definition of the statute in regard to what is murder in the first degree characterizes the crime of defendant as of that and of no other class.

In speaking of this subject, Wharton (Whart. on Hom., sec. 58, page 58.) lays down the rule to be that "*where a legislature thus creates a statutory offense, the statutory definition is absolute.*" Again in section 40, page 40, "where a statutory line is to be followed it has been held that when the damage intended was such as would probably result in death, it is murder in the first degree, even though the death may have been but incidental to the offender's purpose." Had death not resulted from the severe injuries and great bodily harm inflicted upon deceased, it can not be denied that for the infliction of the injuries as stated in the opinion of the court and as shown by the evidence, without justification or excuse, the defendant would have been amenable to a prosecution for a felony under section 33. In committing this felony the death of deceased was occasioned, and the statute interposes with its "absolute rule" and declares that a murder committed under such circumstances shall be deemed murder in the first degree. There is no ambiguity in the language of the act; it is plain and explicit in the declaration that every murder committed in the perpetration or attempt to perpetrate any felony shall be murder in the first degree. "Statutes are to be interpreted according to their natural and obvious meaning and where there is no ambiguity in the language and its meaning and purpose are clear, courts are not authorized either to limit or extend the act by construction." Cearfoss v. State 1 Am. Crim. Cas. 460.

I cannot, therefore, accept a construction of the statute which limits the operation of the words, "other felony," only to those felonies which are distinct and separable from a felony committed on the person whose death is occasioned in the commission of the felony.

The felony committed by B in inflicting great bodily harm on A, under unjustifiable or inexcusable circumstances, is no more merged in the killing of A if the death is occasioned thereby, than would the felony of B in committing a rape on A, resulting in A's death. If B starts out with a fixed felonious purpose to "inflict great bodily harm" on A, under circumstances neither excusable nor justifiable, without intending to kill but to stop with the infliction of great bodily harm, and death ensues, the felony committed in inflicting the great bodily harm is no more merged in the killing than would a rape perpetrated by B upon A, which resulted in the death of A, be merged or lost sight of in the death of A. The crime in either case would be murder in the first degree, notwithstanding the violence used in committing the rape and in inflicting the injuries occasioning the death would necessarily be directed against the person killed and would be the sole cause of the death, though not inflicted with a murderous intent and purpose. It is said in the statute that murder "committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or *other felony*, shall be murder in the first degree." In all these enumerated cases the General Assembly has declared the law that the perpetrator shall be held guilty of murder in the first degree, without further proof that *the death* was the ultimate result which the will, deliberation and premeditation of the party accused sought. Neither of the two specified crimes of rape or robbery could be committed without an assault directed against the person of the one raped or robbed. So there are included in the words, "*other felony*," a large number of crimes classified as felonies, which could not be committed except by violence directed against the person. It is made a felony by our statute for one person, on purpose and of malice, to cut or disable the tongue, or to cut off and disable any limb or member of another with intent to kill, maim or disfigure him. Now, if A, in feloniously cutting off the tongue of B, or in feloniously castrating him with no other intent than to maim or disfigure him, occasions his death, can it be said that it was not the intention of the legislature that he should be held answerable for murder in the first degree, although his specific intent was only to maim and not to kill, and that the felony thus committed, being directed against the person whose death was occasioned by its commission was not, for that reason, such a felony as was contemplated by the General Assembly in the use of the words, "other

felony," in defining the crime of murder in the first degree?

A further illustration may be drawn from section 33, *supra*, which makes it a felony where any person shall be maimed, wounded or disfigured, or receive great bodily harm, in cases and under circumstances which would constitute murder or manslaughter if death ensued. Now if A, with no intent to kill B, but with a purpose to maim him and send him through life a limbless man, should, on purpose, without cause or excuse, cut off the hand of B, the felony would be consummate and complete as soon as the act of maiming was done, and A would be liable to immediate arrest, trial, conviction and punishment for the felony. If B should thereafter die within a year, his death being occasioned by the maiming, A would be answerable for the murder, although the act of maiming would constitute a necessary ingredient and element of the homicide. Now, the homicide thus committed would be murder at common law. What would this common law murder be under the construction given to the first and thirty-third sections, in the opinion of the court? A could not be convicted of murder in the first degree for a willful, deliberate and premeditated killing, because the facts of the supposed case show that he did not intend to kill, but only to maim; nor could he be convicted of murder in the first degree for killing B in committing the felony of maiming him, because the felonies mentioned in the thirty-third section are said not to be embraced in the words "*other felony*," used in the first section defining murder.

Nor could he be convicted of murder in the second degree, because, as this court has held in the case of State v. Wieners, *supra*, an intentional killing must be shown before a conviction could be upheld in that degree. Nor could he be convicted of manslaughter in the first degree, because, before a conviction can be had in that degree, the party charged must be shown to have committed the homicide in committing a crime or misdemeanor not amounting to a felony. Every other section of our statute defining manslaughter in the second, third and fourth degrees, would be alike inapplicable, and the result would be that the perpetrator of the common law murder, thus committed, could not, under our statute, be punished *at all*, if the construction placed upon sections one and thirty-three, *supra*, is to prevail.

In my opinion, the construction placed upon section thirty-three, that it makes the infliction of great bodily harm *only* a felony when death *does not ensue*, and that if death *does ensue* it is made murder or manslaughter, according to circumstances, is not warranted by the language of the act. Whether the infliction of great bodily harm, in cases and under circumstances which, if death ensued, would be murder or manslaughter, is a felony or not, does not depend upon the question whether the party injured *dies or lives*, but upon the circumstances under which the act was done; and if the circumstances attending the act do not show justification or excuse, the felony is complete; and if death does ensue, the character or degree of the homicide is not determinable by the provisions of section 33, but by section one of the statute, which provides that a murder committed in the perpetration or attempt to perpetrate a felony, shall be murder in the first degree, thereby announcing in unmistakable terms the *absolute rule* before mentioned.

I can not subscribe to the doctrine announced, that the words "other felony," used in the first section, defining murder in the first degree, refer to some *collateral felony*, and not to those acts of personal violence to the deceased which are necessary and constituent elements of the homicide itself, and are therefore merged in it. This construction abrogates the section, and under it A, who shoots at B with intent to maim him only (which is a statutory felony), and kills C, would be guilty of murder in the first degree; while if the shot intended only to maim had killed B, he would only be guilty of some lower grade of homicide. It is conceded that if the death ensues from the perpetration, or attempt to perpetrate, any of the specified felonies, viz.: arson, rape, robbery or burglary, the offense would be murder in the first degree. Why should it not be so in regard to any other felony? The language of the law is, if the murder is committed in the perpetration of the enumerated felonies, or "other felony," it shall be murder in the first degree. The words "other felony" are comprehensive enough to embrace every felony defined by the statute, and it is for the legislature, and not for the courts, to restrain their operation. The crime of inflicting great bodily harm, as defined by section 33, is just as susceptible of perpetration, although the murder is also committed as is rape or robbery. The rape is consummate when penetration is made by force, and against the will and consent of the person; and if death ensues from the violence inflicted in the *perpetration of the rape itself*, the crime of murder under the first section at once appears, although the acts of personal violence to the deceased were necessary and constituent elements of the offense. So it may be said that when A intentionally inflicts great bodily harm on B, under circumstances which the law neither excuses nor justifies, the crime of felony is consummate as soon as the "great bodily harm" is inflicted, and he may at once be arrested for the felony, put upon his trial and punished; and if B suffer and linger from the bodily injuries thus received, and die within one year and a day by reason of the "harm" so inflicted, the perpetrator of the offense may be also indicted and put upon his trial for the murder. For if one be convicted of an assault and battery, or assault with intent to kill, and afterwards the injured party dies within a year and a day of the wounds inflicted, such conviction would be no bar to an indictment for murder or manslaughter. Kelly's Crim. Law, § 222, p. 119; 12 Pick. 496, 3 Dev. & Batt. 98; 1 Park C. C. 183; 5 Ind. 527. The crime of inflicting great bodily harm, under circumstances neither excusable nor justifiable, which occasioned the death of the person injured, is as separable and distinct from the homicide as is the crime of rape which occasions the death of the person upon whom it is committed, separable and distinct from the homicide.

Both are felonies under the statute; and if, in committing either, death ensues as a necessary consequence, the law pronounces, with inflexible certainty, the crime murder in the first degree.

In the case of State v. Green, 66 Mo. 631, the court instructed the jury to the effect that if the deceased was a deputy marshal of Jackson county, and had in his possession a warrant for the arrest of defendant, and that he exhibited the same to defendant and informed him of its contents, and that he was proceeding in a quiet manner to arrest defendant, and that defendant resisted such arrest, and shot and killed deceased to avoid arrest, such killing was murder in the first degree. This instruction was expressly approved on the authority of the case of State v. Jennings, *supra*. It is difficult to conceive how the crime of resisting an officer can be committed without personal violence to the officer, and such personal violence resulting in the death of the officer would constitute a necessary ingredient and element of the homicide, and although such violence was directed against the person, it would be murder in the first degree under our statute, as was held in that case.

By what authority can it be said that this or that felony is not included in the words "other felony," used in the statute? The words are broad enough to include all. And if we abandon the absolute statutory rule, *what test* is to be adopted or rule established by which we are to determine whether this felony was intended, and that felony not? The statute is a declaration to all citizens of the State that whoever in committing or attempting to commit a felony, commits a homicide, which would be murder at common law, shall be guilty of murder in the first degree.

Nor can I assent to the conclusion announced that the facts of this case, disclosing, as they do, a case of murder at common law occasioned by the infliction of great bodily harm, would justify an instruction for manslaughter in the fourth degree. Section 17, page 447, Wag. St., defining that grade of manslaughter, could not apply, because the killing must be done under it "by means neither cruel nor unusual, in the heat of passion." The killing in this case was done by the most cruel means, and without heat of passion. Section 18, pp. 447, 448, Wag. Stat., defines manslaughter in the fourth degree as "every other killing of a human being by the act, procurement or culpable negligence of another, which would be manslaughter at common law, and which is not excusable or justifiable, or is not declared in this chapter to be manslaughter in some other degree." This section can not be held to apply here, because it is conceded, and the facts unquestionably show, that the killing of the deceased by the accused was murder at common law, and every murder at common law is governed by sections 1, 2 and 7 Wag. Stat. 445, 446, and is, under these provisions, either murder in the first or second degree, or manslaughter in the first degree.

Judge Ryland, who wrote the opinion in the case of State v. Jennings, *supra*, in the use of the words, "homicide committed in inflicting great bodily harm," used them with reference to the facts involved in the case he was considering. The facts established that the homicide was unquestionably murder at common law, and that the bodily harm inflicted on Willard, whose death resulted, was without any justification or excuse. The language employed by him is, therefore, only open to verbal criticism, which in no manner affects the correctness of the conclusion reached, which was, that "although it was not the intention of those concerned in lynching Willard to kill him, but that they did intend to do him great bodily harm, and that in so doing death ensued, such killing is murder in the first degree by the statute of the State." It would have been a work of supererogation for the court in that case to have added, after the words "great bodily harm" in the instruction, the words "without just cause or excuse," as there was not a particle of evidence even tending to show such cause or excuse. Had such words been added, it would have been the duty of the court to have further instructed that, under the evidence, there was no just cause or excuse for inflicting the great bodily harm. So in the case at bar; all the evidence showing that defendant inflicted the beating on the deceased child without the slightest excuse, in a most barbarous manner, as detailed in the opinion of the court, it would have been a useless act for the trial court to have added the words, "without justification or excuse," to the words, "great bodily harm," where they occur in the instruction, and thus have required the jury to have found a fact which, under the evidence, it would have been the duty of the court to have told them, in another instruction, they could not find.

It is true that the court might well, as it did in an instruction, put the case before the jury on the theory of a willful, premeditated and deliberate killing on the part of defendant. While this is true, it is equally true that there was another theory more properly applicable to the facts of the case, upon which the State had a right to demand, at the hands of the court, it should be put to the jury, viz., that every murder committed in the attempt to perpetrate rape, robbery or other felony, is murder in the first degree, without reference to the question of intent to kill on the part of defendant.

I therefore think that the court committed no error in submitting the case to the jury on both the theory of a willful, premeditated and deliberate killing, and a killing committed in perpetrating a felony without intent to kill.

SHERWOOD, C. J., concurs in the views above expressed.

NOTE.—It is gratifying to the student of the criminal law that a part of the errors in the cases of State v. Jennings, 18 Mo. 435, and State v. Nueslein, 25 Mo. 111, have yielded to correct legal principles, which thorough investigation uniformly developes. Upon the point on which the above named cases are overruled, the arguments of the learned judge, who delivered the opinion of the case at bar, are at once clear and conclusive, and abundantly supported by authority. This case is such an important advance in favor of correct legal principles, that it is to be regretted the judges did not all concur. But, for myself, I feel a deeper regret that the knife was sheathed, leaving a

branch so fully in reach of the skillful operator, and which so mars the beauty of the tree.

Hough, J., speaking for the majority of the court, says: "There is no conflict between this and the case of State v. Green, 66 Mo. 631. In the latter, the defendant, at the time of the homicide, was resisting an officer under circumstances which made such resistance a collateral felony, both at common law and under the statute." Waiving, for the present, all discussion of the force of the words "or other felony," contained in the section of our statute defining murder in the first degree, I insist if a man is to be hung for a murder not committed willfully, and with deliberation and premeditation, but in the perpetration, or attempt to perpetrate, a collateral felony, he is entitled to a trial on the specific charge. In other words, that proof of a murder which was not "willful, deliberate and premeditated," but which was committed in resisting an officer under circumstances which makes such resistance a felony, will not support an indictment charging only a willful, deliberate and premeditated murder.

That a *murder* (not "homicide," as the types make the learned judge, in State v. Green, say), committed in the perpetration, or the attempt to perpetrate, any felony, is murder in the first degree, may be conceded for the purpose of this investigation. The question then is, not what kind of killing constitutes murder in the first degree, but what kind of killing must be proved to support an indictment in which the murder is charged as "willful, deliberate and premeditated."

In State v. Jones, 20 Mo. 58, Ryland, J., speaking for the court, after quoting the statute, says: "Under this statute the practice has been to describe the murder as it is laid down thereby; if it be committed by means of poison, to state it so; if by lying in wait, to set it forth accordingly; and if by any other kind of willful, deliberate and premeditated killing, to aver it to have been so done. The first case reported under the statute of 1835 is the case of Bower v. State, 5 Mo. 364. Since this case, it has been the practice in indictments for murder, in order to justify a conviction for that offense in the first degree, to set forth the offense, according to its nature and circumstances, as required by the statute. * * * * Although a different practice, under statutes using somewhat similar phrases in declaring what shall be murder in the first degree, and what in the second degree, has prevailed in the States of Pennsylvania, New York and Tennessee (see Com. v. White, 6 Binney, 183; People v. Enoch, 13 Wend. 159; and Mitchell v. State, 5 Yerg. 340), yet we consider it safest to follow the practice which has prevailed so long in our own State."

In State v. Worrell, 25 Mo. 205, the indictment charged a willful, deliberate and premeditated murder, and as the evidence tended to prove a murder committed in the perpetration of a robbery, the point of variance was sharply presented, and the court distinctly recognized the doctrine of the case of State v. Jones, *supra*, and correctly decided that while robbery was the ultimate object, the proof was sufficient to support the charge of a willful, deliberate and premeditated murder—that the taking was from the dead body, the murder having been first committed.

So the facts proved in the case of State v. Green, *supra*, abundantly support the charge of a willful, deliberate and premeditated murder; but when that kind of murder was alone charged in the indictment, I would suggest (with due deferance) that it is a departure from correct legal principles, as well as from the recognized practice in this State for a third of a century, to admit proof and give instructions in respect to a murder (not even remotely hinted at in the indictment) committed in the perpetration, or attempt to perpetrate, a collateral felony.

It is quite clear that the cases of State v. Worrell State v. Jones and State v. Green can not stand together. Upon principle the latter must yield.

J. H. S.

DIGEST OF DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

October Term, 1878.

BANKRUPTCY — SUIT BY ASSIGNEES IN STATE COURTS.—"In Claflin v. Housman, 98 U. S. 143, 3 Cent. L. J. 803, we held that an assignee in bankruptcy, under the bankrupt act of 1867, as it stood before the revision, had authority to bring suit in the State courts whenever those courts were invested with appropriate jurisdiction suited to the nature of the case. This suit was begun March 18, 1872, before the Revised Statutes were in force. Sec. 5,597 provides that the repeal of the acts embraced in the revision should not affect any suit or proceeding had or commenced in any civil cause before the repeal. This leaves the present case, therefore, within the rule settled in Claflin v. Housman, and renders it unnecessary to consider whether the jurisdiction in this class of cases was taken away by the revision as to suits afterwards commenced."—*Wilson v. Goodrich.* In error to the Superior Court of the State of Massachusetts. Opinion by Mr. Chief Justice WAITE. Judgment affirmed.

MISNOMER — NO GROUND FOR REVERSAL.—The defendants were described in the complaint as "Commissioners of the County of Pickens," but the demand set forth in the complaint was against the the "County of Pickens." The constitution or statutes of the State give no direction as to the name by which a county shall be sued. No objection as to the misnomer was raised at or before the trial. *Held*, no ground for reversal. The Revised Statutes of South Carolina provide (§ 199) that "the court shall in every stage of the action disregard any error or defect in the pleading or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed by reason of such error or defect." By another section (196) it is provided that "the court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense, by conforming the pleadings or proceedings to the facts proved." Where suit was brought against "Wm. H. Cockle, intendant, and John R. Schwab, Joseph Herndon, Robert Wright and Edward Wheeler, wardens, the town council of Yorkville, in the State of South Carolina," it was objected at the hearing on appeal that the suit was against the parties in their individual capacity and not as the town council of Yorkville. The supreme court said "the defendants have failed to present the objection at the proper time and in the proper way, and can now claim no benefit from it." MS. Case. The statutes of the State of New York on the subject of amendments are almost verbatim the same as those of South Carolina above quoted. In the case of Bank of Havanna v. Magee, 20 N. Y. 355, Charles Cook was an individual banker transacting business under the name of the Bank of Havanna, there being in fact no corporation of that name. On the trial a judgment in favor of the Bank of Havanna was offered in evidence, which was objected to on the ground that the plaintiff had not proved itself to be a corpo-

ration, which was overruled. In sustaining the ruling, the court of appeals, by Denio, J., said: "But I am of the opinion that when it appeared on the trial that the plaintiff's attorney had fallen into the mistake of stating the name which Mr. Cook had given to his bank as the creditor of Wickham and as the plaintiff in the suit, instead of his own name, a plain case was presented for amendment under the 173d section of the code." The error was disregarded. So in Traver v. Eighth Av. R. Co. 6 Abb. N. S. 46, the Court of Appeals of the State of New York, Grover, J., delivering the opinion, cited the foregoing case with approval, and held that where an action was brought by a married woman in her maiden name it was a mere misnomer, and when not objected to at the trial would be disregarded on appeal.—*Anthony v. Bank of Commerce.* In error to the Circuit Court of the United States for the District of South Carolina. Opinion by Mr. Justice HUNT. Judgment affirmed.

ABSTRACTS OF RECENT DECISIONS.

COURT OF APPEALS OF KENTUCKY.

January Term, 1879.

THE REAL ESTATE OF AN INFANT can not be subjected to the payment of board and tuition. Sec. 9, art. 2, ch. 48, G. S. A father can not make a contract for the board and tuition of his infant daughter, so as to make her real estate liable for the debt thus created. Reversed. Opinion by PRYOR, C. J.—*Coe v. Storts.*

A POST NUPTIAL CONTRACT BETWEEN HUSBAND AND WIFE, whereby she put her money in his hands to be invested by him in a house and lot, to be conveyed to her, would be enforceable, as between husbond and wife, but after the husband had invested the money and caused the house and lot to be conveyed to himself, and becoming embarrassed had made an assignment and conveyed the house and lot to his assignee for the benefit of his creditors, such contract between himself and wife will not be enforced in favor of the wife in preference to creditors. Pryor v. Smith, 4 Bush, 379; Whitesides v. Davies, 7 Dana, 108; Martin v. Trigg, 8 B. Mon. 529; Lattimer v. Glenn, 2 Bush, 543; Watson v. Roberts, 4 Bush, 39; Maraman v. Maraman, 4 Met. 90. Affirmed. Opinion by ELLIOTT, J. —*Darnaby v. Daruaby.*

PERFORMANCE OR EXCUSE FOR NON-PERFORMANCE OF CONDITION PRECEDENT MUST BE PLEADED AS REQUIRED AT COMMON LAW—VICIOUS CONSIDERATION.—1. At common law it was ordinarily required of the pleader not only to make an allegation of the performance of a condition precedent, but a statement of the time and manner of its performance, in order that the court might determine, as a matter of law, whether the intention of the covenant had been fulfilled, and in order that the traversable issue might be presented. 2. Sec. 149 of the code of 1851 providing that; "in pleading the performance of a condition precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part," etc., was omitted from the code of 1877, and its omission must be construed as an intention to restore in such cases the common law rule of pleading as it had been interpreted prior to the adoption of the code of 1851. 2. Contracts having for their consideration an agreement to impede, hinder or defeat the administration of the criminal or penal laws, are void as against public policy. A part of the entire consideration being vicious, the whole contract is void. Kimbrough v. Lane, 11 Bush, 558; Tool Company v. Norris, 2 Wall. 55. Affirmed. Opinion by HINES, J.—*Overback v. Hall.*

SUPREME COURT OF ILLINOIS.

[Filed at Ottawa, January 25, 1879.]

INDICTMENT — SELLING LIQUORS WITHOUT LICENSE—STATUTORY CONSTRUCTION—INTERPRETATION OF TERM "PUBLIC RESORT."—This was an indictment against B for selling intoxicating liquors contrary to sec. 2, ch. 43, Rev. Stats. 1874, entitled "Dramshops," which declares that whoever not having a license to keep a dramshop "shall by himself or another * * * * sell any intoxicating liquor in less quantity than one gallon, or in any quantity to be drunk upon the premises, or in or upon any adjacent room, building, yard premises, or place of public resort, shall be fined," etc. In the court below defendant was found guilty. The ground relied upon to reverse the judgment is that the court erred in giving an instruction in substance that if they found from the evidence that defendant sold beer to various persons by the gallon, and that at the time of such sale he knew or had good reason to believe the person to whom he sold were going to drink the beer in the public street or alley adjoining his brewery where the sale was made, and that the beer was so drunk, they might find the defendant guilty under such counts of the indictment as charged a sale of liquor to be drunk on premises adjacent to the premises where the sale was made. It appeared from the evidence that the beer was obtained from defendant's brewery and was taken out and drunk on a public street or alley adjoining the brewery. CRAIG, C. J., says: "The argument of the counsel for defendant. as we understand it, is that a public street or alley is not a place of public resort, either in the sense in which these words are used in the statute, or according to the ordinary acceptation of the term 'public resort.' Whether a street and alley would be regarded as a place of public resort would, to a great extent, depend upon the manner in which they were used. We see nothing to prevent a street or alley from being so used by the public that they might be regarded as plaees of public resort, within the intent and meaning of the statute. Here, as appears from the evidence, persons numbering from six to twelve, were in the habit daily of congregating for the purpose of drinking beer. * * * * We see no reason, when the evidence is considered, why the street and alley adjoining the brewery might not be regarded as places of public resort, within the meaning of the act." Affirmed.—*Bondalow v. People.*

INDICTMENT—PROCURING ABORTION—CONSTRUCTION OF STATUTE.—This was an indictment for the crime of murder in procuring an abortion on a woman, from the effect of which she died. Motion was made to quash the indictment, but overruled. On trial had defendant was found guilty. Defendant appealed, and urges two grounds for reversal: 1st. Because the indictment was not returned into court by a grand jury empannelled under the laws of the State. 2d. Because the indictment fails to allege that the miscarriage was not produced as necessary to save the life of the person alleged to have been murdered, and imply negatives the absolute necessity of producing

abortion, in order to save the life of the woman, and would make defendant criminally liable for an honest and excusable error. SCOTT, J., says: "Twenty-three grand jurors were in fact chosen, but on the roll being called only twenty-two of the number chosen answered, and the one failing to answer was, by the court, excused from service. The grand jury thus consisted of twenty-two members. Sec. 16, ch. 78, entitled 'Jurors,' declares that a panel 'of a grand jury shall consist of twenty-three persons, sixteen of whom shall constitute a grand jury.' But the 9th section of the same chapter provides that 'if for any reason the panel of the grand jury shall not be full, * * * * the judge shall direct the sheriff to summon from the county a sufficient number,' etc. It is said that it was error to omit the duty enjoined. That depends upon the construction that shall be given to this clause of the statute, whether it shall be held as mandatory or directory. Reading the word 'shall' as 'may,' as is allowable from the context, it is simply directory. That is plainly its meaning. Whether the indictment was defective in negativing in the precise language of the statute, the fact that the abortion may have been produced, or attempted as necessary for the preservation of the life of the mother, presents a question of some difficulty and one not altogether free from doubt. The law makes the producing of a miscarriage a crime 'unless the same were done as necessary for the preservation of the mother's life.' Undoubtedly the general rule is, where an act is made criminal, with exceptions embraced in the same clause of the statute which creates the offense, so as to be descriptive of the offense intended to be punished, it is necessary in the indictment to negative the exceptions so as to show affirmatively the precise crime defined has been committed. * * * * But it is immaterial that the precise words of the statute are not employed for that purpose. The words of the indictment are, 'it not being necessary,' etc. Philologists give to 'as,' when used in the English language, when the context seems to require it, the same meaning as 'it' or 'that.' Adopting this construction as fully authorized, we understand negatives the exceptions of the statute by use of the converse 'it not being necessary.'" Affirmed.—*Beasly v. People.*

GARNISHMENT—RIGHT TO GARNISH MONEY DEPOSITED IN BANK BY ONE AS SHERIFF FOR A DEBT DUE BY HIM AS AN INDIVIDUAL.—This was a garnishment proceeding brought by the Excelsior Stone Co. against M, a banker, to garnish any moneys credit, etc., belonging to Francis Agnew, against whom the said company had recovered a judgment, an execution whereon had been returned "no property found." The answer of M to the interrogatories filed stated explicitly that he had no property, credits, etc., in his possession belonging to Agnew, and that he was not in any manner indebted to him, but that he, as a banker, had a bank account with Francis Agnew, sheriff, upon which there was a balance to the credit of "Francis Agnew, sheriff." At this stage of the proceedings the said Francis Agnew voluntarily came into court and filed his sworn interpleader, in which he stated that he was sheriff of Cook county; that as such he had collected money upon various executions, and deposited the same in the bank of the defendant M to the credit of an account entitled "Francis Agnew, sheriff," and that it was a special deposit made in trust for the use of and to be used for the sole purpose of paying the moneys which the said Agnew had collected on executions in his official capacity of sheriff. Judgment was rendered against the defendant, from which he appeals. SHELDON, J., says: "Upon the facts set forth in the interpleader there should have been no judgment, we think, against the garnishee. The money had been collected for execution creditors, and was deposited for the purpose of being paid over to such creditors when called for. We can not adopt the view of appellee that Agnew had no authority as sheriff to deposit in bank money so collected, and that by that act he converted the funds to his own use. It is objected that no execution creditor appears to claim the money. We regard Agnew as appearing as trustee for the execution creditors and on their behalf. The money was not the proper money of the sheriff applicable to the payment of his general debts; it would have been wrongful for the sheriff himself to have so applied it, and the law should not compel such a misappropriation." Reversed.—*Meadowcraft v. Agnew.*

FORECLOSURE—MORTGAGE— NOTICE BY MASTER IN CHANCERY TAKING TESTIMONY TO GUARDIAN OF MINOR HEIRS—STRICT FORECLOSURE.— This is a writ of error brought to reverse a decree of the circuit court rendered against plaintiffs in error as the minor heirs of B in a suit to foreclose two mortgages given by said B in his lifetime. A guardian *ad litem* was appointed for the minor heirs, who answered, and the case was referred to a master in chancery to take proofs, which being done, and a report made, a decree as above was rendered. It does not appear that there was any notice to the guardian *ad litem* of the taking of the testimony before the master. The usual decree for the sale of the property was not made, but a strict foreclosure of the equity of redemption, and that the mortgagee take the mortgaged property, was decreed. SHELDON, J., says: "In Turner v. Jenkins, 79 Ill. 228, it was held that where testimony is taken before a master in chancery without any notice to the guardian *ad litem* of infant defendants, it is not admissible as against the infant, for want of notice, and this though the guardian may have made no objection at the hearing. * * * * As the decree is not sustainable without the facts found by the master's report, we must hold under the decision referred to that there was error in the admission of and acting upon the proof taken before the master without notice to the guardian *ad litem*. We would not however be understood as holding that this ground of error would have lain had the master's report merely contained proof of the execution of the mortgage and a computation of the amount of the mortgaged debt, but it went further, finding the insufficiency of the security. The decree found that the mortgagor B had previously died insolvent; that the the mortgaged property was not worth the mortgage debt, and a strict foreclosure. In 50 Ill. 275, it was said: 'In our State, and in view of our statute, it is only in strong cases which form exceptions that there should be decreed strict foreclosure or a sale without redemption. It may be in rare cases when it appears that the property is of less value than the debt for which it was mortgaged, and the mortgagor is insolvent, and the mortgagee is willing to take the property in discharge of the debt. that a strict foreclosure may be allowed.' The insolvency of the deceased mortgagor's estate assimilates the present case to that where there are other incumbrances upon the property. In England, where the practice in common cases is that of a strict foreclosure, the courts of equity have departed from that general rule, and decree a sale in certain and special cases, among which are those where the mortgagor is dead and there is a deficiency of personal assets, and where the mortgagor dies and the estate descends to an infant. 2 Story's Eq. Jur. §1026, where the authorities are cited. We are inclined to the view that, under the circumstances of the present case, the usual practice should have been followed and a sale decreed of the premises instead of a strict foreclosure." Reversed.—*Boyer v. Boyer.*

SUPREME COURT OF MICHIGAN.

January Term, 1879.

PROMISE TO STOCKHOLDERS TO PAY DEBTS OF CORPORATION— DAMAGES.— Pratt promised certain stockholders, in consideration of their transferring to him some of their stock, to pay the debts of the corporation. They were not liable, being interested only as stockholders. He failed to pay a certain debt, and the creditor brought assumpsit on an assignment of this agreement with the stockholders. *Held*, 1. That a verbal promise to the creditor to pay another's debt is within the statute of frauds and void, but if made to the debtor is good. Green v. Brookins, 23 Mich. 48. 2. That the creditor, claiming as assignee of the stockholders, can only recover the same amount and on the same conditions with them. 3. That the assignment conveyed nothing but their damages arising out of the non-payment of one debt. 4. That where a promise is made to a debtor to pay his debt the measure of damages for failure is the whole amount of the debt; but where, as here, the promisees were not liable, they or their assignee can only recover what they have lost by the default. 5. That there is no cause of action, since nothing was assigned but the damages resulting to them as stockholders from the non-payment of one debt, and that can not be effectually ascertained in a court of law or severed from the entire transaction. Opinion by CAMPBELL, C. J.—*Pratt v. Bates.*

POSSESSION OF STOLEN GOODS — PRESUMPTION OF GUILT. — Conviction of larceny. Several of the stolen articles were found four months after the theft on premises occupied by respondent, some of them in his bed. Search was made without success the day before, but on going again they were discovered in his bed. His brother, who occupied another part of the same house, and who had previously pleaded guilty to the same larceny, testified that he put the articles where they were found after the first search was made, and that respondent had nothing to do with them. *Held*, that it was error not to charge the jury as requested, that the fact of possession of stolen property, standing unconnected with any other circumstances affords but slight presumption of guilt. If immediately subsequent to the larceny, it may sometimes be almost conclusive. Walker v. People, 38 Mich. But the presumption weakens with the time that has elapsed, and may scarcely arise at all if others beside the accused have had equal access with himself to the place of discovery. Opinion by COOLEY, J.—*Gulick v. People.*

INTEREST CAN BE IMPLIED ON SECURITY ONLY AT STATUTORY RATE — CHANCERY PROCEDURE — DECREE BASED ON COMMISSIONER'S REPORT—EXCEPTIONS—APPEAL. — Complainant having cashed $24,000 of paper made by defendant, the latter took it up and gave his notes instead for that amount on two years' time, at ten per cent. interest. Eight months after he gave complainant a mortgage deed for $21,000, containing no express identification of the debt, and no terms expressly applying the deed to a specific $21,000; and it was silent as to time of payment and in regard to interest, *Held*, 1. That the mortgage was due as soon as given, and was by implication an interest bearing security from date, or at least from the maturing of the notes. Sheeby v. Mandeville, 7 Cranch, 208; Farquhar v. Morris, 7 T. R. 124; Purdy v. Phillips, 1 Duer, 369; Young v. Godbe, 15 Wall. 562; N. Penn. R. Co. v. Adams, 54 Penn. St. 94. 2. That as it was a distinct security, not connected with the notes, a material stipulation in the notes cannot be imported into it without destroying its legal identity as a contract; and this security contains no written stipulation for ten per cent. interest; therefore it bears only the statutory rate of seven per cent.; seven per cent. interest can be implied, but ten per cent. can not be. 3. That whenever a matter is by decree duly committed to a commissioner to obtain the result of his investigation and judgment to serve as a basis for a subsequent decree of the court, his regular report, if not excepted to or complained of, binds the parties, and the court should decree accordingly; and when it has been confirmed without objection, and been followed by a final decree that is allowed to stand, an appellate court can not review it or re-examine the matter of the final decree which rests upon it. 4. That, however, when the interlocutory decree preceding reference decides the turning point of the case, exceptions to the court are not available to compel a re-examination on that point; there should be a motion or petition to the court, or resort to the appellate court. Clark v. Willoughby, 1 Barb. Ch. 168. 5. That where an interlocutory decree, ordering a reference, has decided that the complainant was entitled to interest and fixed the rate, an omission to except to the commissioner's report does not preclude defendant from an appeal on these points. Opinion by GRAVES, J.—*Eaton v.. Truesdail.*

DELIVERY AND POSSESSION — RESCISSION OF SALE.—D, owning a stock of goods, was induced by M and G, into an agreement to form a corporation, they agreeing to pay to the corporation a large amount of money, and he joined with them in a bill of sale to the company, which was delivered to M, to be held, as D swore, conditionally, and not to be delivered to the company until he was paid. M and G, as president and secretary of the company, afterwards mortgaged the goods, and they even seized under the mortgage. *Held*, 1. That as M was one of the original grantors to the company with plaintiff and G, so that there could be no delivery in the ordinary sense of the term, the bill of sale could not become operative against the grantors until they had in some way manifested an intent to make it operative. 2. That possession by a person who is an officer of a company is not the company's possession, unless received or held for that purpose. 3. That a vendor may protect himself by rescission against the fraud of an insolvent vendee who has not paid and does not mean to pay him. 4. If one mortgages goods to which he has no right, the mortgagee is in no better position than he. 5. That where the plaintiff's testimony makes out a *prima facie* case, it is error to take it from the jury because of evidence introduced for the defense. Opinion by CAMPBELL, C. J.—*Doyle v. Migner.*

EJECTMENT AMONG TENANTS IN COMMON — ALLOWANCE FOR IMPROVEMENTS — BUYING UP ADVERSE CLAIMS—TAX TITLE—ESTOPPEL.—Ejectment by defendant in error, claiming, as an heir at law, of the original patentee from the United States, an undivided fifth of certain premises. *Held*, 1. That the Michigan statute, Laws 1875, 207, allowing a defendant in ejectment to pay for improvements does not apply to tenants in common holding undivided interests. 2. That the United States patent is the first instrument which makes an absolute legal title in any one. Until entry of purchase, which is completed by the patent, land is not open to private transfer, or ownership, or taxable. 3. That the record of the patent in the government office at Washington has the same force as the patent itself. McGarrahan v. Mining Co., 6 Otto, 316. Failure to record a patent in the county registry does not affect its validity or operation. 4. That a purchaser from one who holds but an undivided interest in patented lands, and who enters as a stranger to the claims of the co-tenants of the other undivided inter-

ests, is not estopped from setting up against an adverse claim which originated before his purchase—*e. g.*, a tax title originating from his grantor's default. As remarked by the United State Supreme Court, in Blight v. Rochester, 7 Wheat. 548: "The propriety of applying the doctrine between the lessor and lessee to a vendor and vendee, may well be doubted. The vendee acquires the title for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendee are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title, unless he should be called upon in consequence of some covenant or warranty in his deed. The property having become by the sale the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. See, further, Watkins v. Holman, 16 Pet. 25; Willison v. Watkins, 3 Pet. 43; Society for the Propagation of the Gospel v. Pawlet, 4 Pet. 480; Bradstreet v. Huntington, 5 Pet. 402. 5. That there is no estoppel against purchasing tax titles, except against one whose duty it is to pay the tax or remove the burden. Opinion by CAMPBELL, C. J.—*Sands v. Davis.*

BOOK NOTICES.

[NEW BOOKS RECEIVED.—Abbott's Digest of the Law of Corporations: Baker, Voorhis & Co., New York. American Decisions, Vol. 7: A. L. Barncroft & Co., San Francisco. Taylor on Landlord and Tenant: Little, Brown & Co., Boston.]

A TREATISE UPON THE LAW OF PLEADING under the Codes of Civil Procedure of the States of New York, Ohio, Indiana, Kentucky, Wisconsin, Minnesota, Iowa, Missouri, Arkansas, Kansas, Nebraska, California, Nevada, Oregon, Colorado, North Carolina, South Carolina and Florida, and the Territories of Dakota, Wyoming, Montana and Idaho. By PHILEMON BLISS, LL.D., Professor of Law in the Missouri State University, and late Judge of the Supreme Court of Missouri. St. Louis: F. H. Thomas & Co. 1879.

In one of the many congratulatory notices which this excellent work has already received, the fact is pointed out that its publication has come about in the same manner as so many of our best legal treatises have been produced; that is to say, it has been written by a practical lawyer, after a constant study and review of his subject as a lecturer on law. Blackstone, Kent and Story are mentioned as prominent examples of this in other days; Judge Cooley's Treatise on Torts as the most recent but one, and to these should be added Mr. Smith's work on Contracts. The author of the volume before us—the latest and, for the practicing lawyer, the best treatise on pleading under the codes in print—leaving a seat on the Supreme Bench of this State which he had filled with distinction, accepted a professorship of law in the State University. As a practitioner, and as a judge, he had long felt the need of a proper work on the code system of pleading; as a teacher on law he determined that the students under his charge should receive as good a training in the new system as it was possible for him to give them, in the absence of text and reference books adapted to the study of the subject as a science. The knowledge he himself had acquired, and the study he had given to the codes, he set to work to arrange, classify and apply, and a series of lectures to his classes was the first result of this resolve. It was not long before he was urged by many of his friends to place the fruits of his labors in this department before a larger audience, and he was on the point of preparing his lectures for publication, when the announcement of Mr. Pomeroy's work on Remedies and Remedial Rights changed his plans, and delayed their issue for more than two years. The whole profession is the gainer through this circumstance. Meanwhile the manuscript has been in the author's possession, receiving constant additions as the later decisions of the courts were made public, and, doubtless, many alterations, as closer study and further investigation will, as a rule, prompt. We have, therefore, a book which has not been hurried, but which has had time to form and to grow. Thus must every work which is to endure be conceived and be executed.

It would, perhaps, seem that a proper review of Judge Bliss' work must necessarily embrace a comparison with Mr. Pomeroy's; and that the questions which should first present themselves would be as to the relative value of the two, and which one will be of most use to the lawyer in his practice. But we shall not attempt this; we have neither the time nor the space for the proper execution of such a task. We can only say that we have always read Mr. Pomeroy's book with pleasure and profit; that we consider it a great work—an opinion which the author of the present treatise himself expresses in his preface—but that, for the practicing lawyer, we have no hesitation in stating it as our belief that Judge Bliss' treatise will prove the most useful. Where the former is rhetorical, the latter is clear; where the first work is diffusive, the latter work is concise. The reader of Mr. Pomeroy's book is always charmed with his elegance of expression, his apt illustrations, his powerful arguments, his appropriate examples; but he is likely, as we have often done, to lose sight of the principles which are there laid down; and this, too, notwithstanding the author may very well be charged with a too frequent repetition of his rules and reasons. We have not felt this in reading Judge Bliss' work, but have left, for a time, its perusal, with the feeling that we know much more about the subject than before we saw it, and can not soon forget what we have learned. The further we went through its pages the more were we convinced that it is the work of one familiar with the common law system of pleading as but few are, and understanding the theory and object of the code system as not one lawyer in a thousand does. A good library must possess both Pomeroy and Bliss, but it can better do without the earlier than without the later work.

We had marked several passages, which we desired to cite as examples of the clearness and brevity of the author's style, but have only space for two: "When the statute," he observes, "says there shall be but one form of action, form and not substance is spoken of. *Without classification there is no science*" (§ 6). Again, in showing that, although the code expressly abolishes the distinction between the two forms of action, legal and equitable relief may still be spoken of, this passage occurs: "The distinctions abolished are simply those which formerly existed between the two classes of actions, in the manner of stating the facts, in the style of the writ and the mode of submitting evidence; those which arise from the mode of trial, and from the nature of the relief, are as marked as before. While, in reference to the statute, it may not be proper to designate one class as legal actions and the other as equitable actions, yet we are not forbidden to speak of the one as actions for legal relief and of the other as actions for equitable relief. We should not be driven to unnecessary descriptive phrases—be compelled to abandon a familiar and an appropriate word. *Legislation may affect modes of procedure; it will be found more difficult to reform a language.*" No words are wasted here; but the idea intended to be conveyed is driven home with force and directness.

The arrangement of the work is as follows: It is di-

vided, first, into two parts, one of which treats of actions, the other of pleadings. Part one discusses the nature and forms of actions, election, parties and joinder; part two, the complaint or petition, the answer and reply, the remedies and cure for defective pleading. The subdivisions of these divisions are many, but are so distinct and logical that the lawyer, consulting this work for the first time, will have little difficulty in getting very close to what he is searching for at the first glance. A few of these many subdivisions only need be named, such as the title of the petition, the relief, the oath, the answer, the denial, new matter, the counterclaim, the facts which it is necessary and not necessary to state, and the manner in which they should be stated. But the contents of the work can be but poorly shown in this way; the inquirer is respectfully directed to the book itself. The lawyer who studies the chapters on the complaint or petition will have fewer amendments to ask for when his goes into court; and he who gives his attention to the chapters on the answer, and follows the author in his directions there, need have little fear of demurrers. We are sure this book will be popular with the profession in eighteen States and four of the Territories. There, at least, the library of the lawyer who does not have it on his shelves will not only not be complete, but he will lack the most necessary of those necessary articles of his profession which Mr. Bishop has aptly denominated the "tools of the legal trade."

We desire, in conclusion, to compliment the publishers on the handsome manner in which this work is issued. The printing, paper and binding are all that could be desired. The proof-reading—no small matter in a book of over 600 pages—has been done with great care.

The third edition of the LIFE OF RUFUS CHOATE, by SAMUEL GILMAN BROWN, President of Hamilton College, is just issued by Little, Brown & Co., Boston. The great American advocate is here seen in all the phases of his busy life—at home, in court, in the office, in the Senate.——The SOUTHERN LAW REVIEW for February-March, contains the concluding part of Mr. Bump's Paper on Composition at Common Law; an interesting and critical account of the Trial of Sir Walter Raleigh, and an article on the Religious Phase of the Dartmouth College Causes. In addition to these, are the usual book reviews and digest of cases reported in the American law periodicals during the last two months. The present number completes the fourth volume (N. S.) of this excellent law review.——The reprint by the Leonard Scott Publishing Co., 41 Barclay street, New York, of the standard English reviews—BLACKWOOD, THE LONDON QUARTERLY, EDINBURGH, WESTMINSTER, and THE BRITISH QUARTERLY—places in the hands of the reading portion of the profession the best magazines of Great Britain, at a low figure. The first numbers of the reviews for the current volume are just out; the present is, therefore, a good time to subscribe. There is hardly a number of any of those periodicals which does not contain something of interest to the profession. In a paper on England in the Nineteenth Century, in the EDINBURGH REVIEW for January, we find this picture of the criminal law of England a little more than fifty years ago: "With pauperism crime multiplied. The legislature believed that society could be protected only by Draconian penalties. Sir James Mackintosh stated, in 1819, that two hundred felonies were punished with death. He was once told by Burke that, although from his political career he was not entitled to ask any favor of the ministry, he was persuaded he had interest enough at any time to obtain their assent to a felony without benefit of clergy. Hazlett wrote: 'There are more people hanged in England than in all Europe besides.' A majority of those sentenced were reprieved; but it all depended on the temper of the judge. Lord Eldon defended the severity of the laws, because it enabled judges to rid the world of hardened offenders. Transportation, the alternative of death, was inflicted more frequently, but operated as unequally. Male convicts welcomed transportation, and were accustomed to go off shouting and rejoicing, as though some great achievement had been performed." A touching anecdote is told of one woman who was induced to commit a capital offense from her desire to follow her husband who had been transported for the same felony: "But the judge thought it proper to make an example of the unhappy creature, and she atoned by her death on the gallows for her exceeding love. Yet this judicial murderer was no Jeffreys, but probably a kindly gentleman who believed in a future state and would have declaimed against the Bloody Assize."——In another interesting paper in the WESTMINSTER REVIEW, on Dr. Johnson; his Biographer and Critics, his acquaintance with Thurlow and other great lawyers is shown. Johnson said of himself "that he ought to have been a lawyer," and Boswell relates that Sir Wm. Scott (Lord Stowell and a brother of Eldon) said to Johnson, "What a pity it is, sir, that you did not follow the profession of the law! You might have been Lord Chancellor." There can be no doubt that Johnson was eminently qualified to be a great advocate. At the bar his power of arguing at any moment, on any side of any question, would have made him *primus inter pares*. Some idea of his forensic ability may be gained from reading the arguments with which, on several occasions, he supplied Boswell for use in court. But in the opinion of the writer he would not probably have made a good judge. Like his friend Thurlow, he would have been too dogmatic; like him, he would have decided, not reasoned.

NOTES.

CHIEF JUSTICE CAMPBELL, of Detroit, has been again nominated to the Supreme Bench of Michigan. ——The New York *Daily Register* calls attention to the fact that legal subjects are at present very prominent, not only in the "excellent professional journals and reviews" of this country, among which the CENTRAL LAW JOURNAL, the *Albany Law Journal*, the *Southern Law Review*, and the *American Law Review* are specially named, but in the current monthlies and magazines. It proposes to aid its readers in finding access to that which may be of interest to them in this vast and scattered mass of discussion by presenting from time to time a summary of the subjects which are thus treated in both classes of periodicals, grouping them according to the topics considered. The first number of the *Register*, in which this feature appears, opens the index with the subject of International Law, giving a digest of four articles—three from the English *Law Magazine and Review*, viz.: "On the Obligations of Treaties" (November, 1877); "Albericus Gentilis on the Right of War," and "The Laws of War and the Institutes of International Law" (February, 1878); and one from the CENTRAL LAW JOURNAL, viz., "The Supremacy of a Treaty and the Sovereignty of a State" (November 29, 1878). The idea is an excellent one, and if carried out will be of much service ——The disbarment, at the instance of the Bar Association of this city of F. J. Bowman, an attorney, whose case we have previously noticed (see 6 Cent. L. J. 220), has been approved by the court of appeals which, in very lengthy opinion just filed, affirms the judgment of the circuit court.